No. 03-1261

Supreme Court, U.S.
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In The

Supreme Court of the United States

ROCHELLE BROSSEAU, A CITY OF PUYALLUP, WASHINGTON, POLICE OFFICER,

Petitioner,

v.

KENNETH J. HAUGEN,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITIONER'S REPLY BRIEF

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PETITIONER'S REPLY BRIEF

Respondent makes three major arguments opposing this petition: Haugen claims this case is a "fact-bound ruling" which does not present a new "analytical or other important legal question to resolve." *Opposition brief,* 1. Respondent claims this case is consistent with qualified immunity rulings of this Court, and factually-similar cases from other circuits. Finally, he insists the decision has no implications for future Fourth Amendment jurisprudence in the Ninth Circuit.

This case presents an opportunity for this Court to address divergent approaches to facts in the two-step qualified immunity test in Fourth Amendment civil rights cases. The opinions below reveal the need for clarification of the appropriate perspective for assessing the objective reasonableness standard of the first step, and guidance for the degree of factual specificity necessary for the second step's focus on whether the law is "clearly established." These issues deal with facts certainly, but have significance for a wide array of civil rights cases – well beyond the result in this case. The sharply contrasting views of the majority opinion and the dissenting judge joined by five judges dissenting from denial of *en banc* rehearing, demonstrates the polarization of views on the issues and the need for further guidance from this Court.

1. The Ninth Circuit Majority's Analytical Approach Effectively Eliminates the Qualified Immunity Defense Unless All Witnesses Are Unanimous.

Although the Ninth Circuit was careful to repeat the two-part legal standard articulated in *Saucier v. Katz,* 533 U.S. 194 (2001), its lengthy analysis of this case drawing

in all manner of observations from multiple perspectives before, during, and after the shooting amply demonstrates the analytic error. The majority bases its incorrect approach citing a statement in *Siegert v. Gilley,* 500 U.S. 226, 232 (1991) that the first step objective reasonableness determination contemplates that facts should be "[t]aken in a light most favorable to the injured party." *See also, Saucier v. Katz,* 533 U.S. at 201. The appellate court relied upon this phrase to justify a wholesale rejection of important objectives that have always been the underpinnings of qualified immunity in use of force cases: protecting officers from civil rights liability for reasonable decision-making, even mistakes, in the rapidly-evolving and dangerous split seconds when a decision to use deadly force is made. Courts should not be permitted to insulate cases from review by simply parroting this Court's rule while applying a wholly inconsistent analysis to factual circumstances that negate important principles in Supreme Court precedent.

The analytic approach of the Ninth Circuit effectively neutralizes this Court's repeated statements that facts should be viewed from the officer's on-scene perspective. Nominally viewing the facts in a manner favorably to respondent, resulted in the wholesale rejection of the officer's knowledge, beliefs and information relying instead upon facts only available to other witnesses or known only in hindsight. This approach completely undermines the intended purpose of affording immunity from suit in early stages of litigation, immunity that is "effectively lost if a case is erroneously permitted to go to trial." *Mitchell v. Forsyth,* 472 U.S. 511, 526 (1985).

For example, the majority gave weight to Haugen's claims that he was not violent when the only information

known to the officer at the critical time was that he was fighting. Other justifications included information that bystanders could see that petitioner Brosseau's fellow officers were not in harm's way as she feared; bystanders did not see Haugen reaching for a weapon as he attempted to drive away although their vantage point was much more distant and obscured than hers; observers variously believed the shot was fired just before, just after, or during the time the car was starting up, etc. Perhaps most troubling, the majority accepted at face value respondent's claim that he had a "clear path" to safely exit the area directly contradicting the officer's belief that bystanders and fellow officers were at risk.

The opinion requires a jury trial when various witnesses cannot agree on the split-second timing of a shot or when respondent's conclusory assessment of the safety of his driving disagrees with the officer's perception.[1]

The Ninth Circuit's opinion has grafted this Court's analytic framework with an unrealistic and unworkable approach to the first step in the qualified immunity analysis requiring unanimity of observation and opinion to eliminate a jury trial. If objective reasonableness becomes a jury question whenever witnesses and parties are not in complete agreement, the likelihood of qualified immunity shielding all but "plainly incompetent" officers is remote. *Malley v. Briggs,* 475 U.S. 335, 341 (1986).

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[1] The majority concludes that Haugen's assessment that he had "and easy escape" by driving around parked vehicles in his path trumps the officer's stated concern that respondent's reckless driving would endanger persons in the immediate vicinity despite photographs which afford objective evidence of the scene. App. 30-31.

Viewing disputed facts "in a light most favorable to the party asserting the injury" cannot be stretched this far. Few cases could ever be expected to meet this standard, and it would not serve the stated purpose of immunizing reasonable mistakes from civil liability. *Hunter v. Bryant*, 502 U.S. 224, 229 (1991).

Rather, the "essential" and "material" facts known to the officer and viewed from the officer's on-scene perspective that are the appropriate considerations. The essential, material facts in this case *are not disputed*.[2] Among them are the following: (1) respondent Haugen was known by the officer to have felony no-bail warrants; (2) Haugen knew Brosseau was an officer; (3) Haugen was actively eluding lawful arrest when he fled to his car and drove away; (4) before shooting, Officer Brosseau made other less drastic efforts to arrest Haugen and eliminate the threat of his reckless escape, including verbal commands that he open the car door, pointing her weapon implying an intent to use deadly force, breaking the car window and struggling with Haugen over the keys as he tried to start the car;[3] (5) Haugen's vehicular flight occurred in close proximity to two parked vehicles containing four persons, including a young child with the closest vehicle only four feet from his car (described by Haugen as a "tight, small

[2] As a dissenting judge stated: "[T]he majority states that I do not view the facts in the light most favorable to Haugen. But I relied only on facts Haugen does not dispute, facts that compel the conclusion that Haugen's fleeing in his vehicle would have posed a significant threat of death or serious physical injury to others." App. 65.

[3] Even the majority is forced to acknowledge: "At the time Brosseau shot Haugen, it was clear that he intended to flee in his Jeep and that a number of non-lethal measures had failed to prevent him from doing so." App. 32.

space"); (6) the physical layout of the scene was depicted in photographs demonstrating that the officer's position made it impossible for her to know whether other officers previously advised of her position, without warning, would run in front of the Haugen vehicle as it pulled away.

It is true the officer subjectively harbored concerns that Haugen was attempting to retrieve a weapon because she saw him lean down immediately before she shot, but this was not the only reason for her decision. Other witnesses did not see this movement, but the officer was situated much closer to him than they were. He was partially concealed from their view in the car, and the windows were darkened by tinting film and partially covered with newspaper.

Does the failure or inability of distant witnesses to observe negate the officer's perceptions of events only a few feet away? The Ninth Circuit analysis requires that the facts meet such a standard. This Court has not addressed how factual discrepancies or differing opinions can be resolved in a manner that appropriately furthers the purposes of the qualified immunity doctrine.

Respondent claims the Ninth Circuit's opinion is "fact-bound" and "fact specific," implying that this extremely controversial ruling is an anomaly. There is nothing to suggest that this set of facts is any less or more complex than other all-too-common police shooting incidents. Similarly-detailed cases with varying witness accounts will certainly continue to arise.

2. The Ninth Circuit's Treatment of This Case Demonstrates a Clear Split Among the Circuits Concerning Determination of Qualified Immunity in Cases Involving Potential Reckless Vehicular Escape.

Respondent insists this case can be reconciled with the decisions of other circuits addressing use of deadly force to protect against vehicular assault. Respondent is wrong. He claims that the facts of this case "do not remotely resemble" the fact scenarios in cases cited from other circuits claiming that in this case "[t]here was no [prior] high-speed pursuit and no attempt by Haugen to swerve or ram his car at anyone – or indeed, to take any threatening action at all." *Opposition brief,* 16. Officer Brosseau thought there was a grave threat, as did the dissenting judges. Respondent claims that officers must stand by until the potential danger comes to fruition. Respondent and the majority's attempt to distinguish other cases improperly focuses the inquiry on past events rather than the immediate and legitimate concern: the officer's perception of the need to protect herself or others from immediate danger.

Respondent's reliance on suspects' prior reckless driving in other cases neglects to point out that many of the shooting decisions were made when the suspects' cars were stopped and the officers were on foot nearby like Officer Brosseau in this case. *Smith v. Freland*, 954 F.2d 343 (6th Cir. 1992); *Smith v. Capobianco*, 283 F.3d 1275 (11th Cir. 2002) and *Scott v. Clay County*, 205 F.3d 867 (6th Cir. 2000). None of the cases from other circuits requires the omniscient perspective of the scene or after-the-fact considerations about whether the suspect would

have escaped without ramming other motorists or parked cars.

Other cases cited by respondent fail to present the array of *undisputed* facts available in this case, or are not sufficiently similar to this case. The *amici* States have argued that this case presents an opportunity for this Court to clarify the factual specificity necessary for determining whether the law is "clearly established." *Amici Brief of the States*, 17-19. The Fourth Amendment necessarily entails a balancing test of the suspect's right to be free from excessive force and the officer's duty to apprehend suspects and protect the public. This balancing must "accommodate limitless factual circumstances." *Saucier v. Katz*, 533 U.S. 194, 204. The Graham "objective reasonableness" standard does not provide an answer to whether a "particular application of force will be deemed excessive" under the Fourth Amendment. *Id.* at 205. "This inquiry, it is vital to note, must be undertaken in light of the specific context of the case, not as a broad general proposition." *Id.* at 202. Other closely analogous factual precedents available to the Ninth Circuit reached a different conclusion about the objective reasonableness of officer action and the application of qualified immunity.

Cases cited in respondent's brief which have held issues of fact need jury resolution did not present the array of undisputed facts that characterize this case or involved substantially dissimilar fact patterns. Some of these cases include examples of viewing facts from a perspective other than the officer's – erroneously, petitioner would submit. *Starks v. Enyart*, 5 F.3d 230 (7th Cir. 1993) (pre-*Saucier* case holding that a police officer's decision to step in front of a suspect's fleeing vehicle created the threat of serious physical harm used to justify

deadly force); *Cowan v. Breen*, 352 F.3d 756 (2nd Cir. 2003) (non-suspect passenger with no known dangerous propensities shot while driving vehicle toward officer after suspect fled the scene); *Thompson v. Hubbard*, 257 F.3d 896 (8th Cir. 2001) (suspect in field shot by two officers who gave conflicting versions of facts, incident not related to vehicular flight); *McCaslan v. Wilkins*, 183 F.3d 775 (8th Cir. 1999) (witnesses disputed officer's claims that shots were fired while vehicle moving toward them); *Hernandez v. Miami*, 302 F.Supp.2d 1373 (S.D.Fla. 2004) (suspect shot running away from officer after having removed a gun from his waistband, dropping it at scene).

3. The Majority's Incorrect Analysis Will Result in More Cases Being Sent to Juries.

Respondent urges that because *some* Ninth Circuit cases have applied qualified immunity since this decision, attempting to refute petitioner's arguments that many other appropriate cases will mistakenly be sent to trial. It was *this Court's* stated concern in two earlier Ninth Circuit cases that the refusal to properly apply qualified immunity results in unnecessary jury trials with the attendant diversion of official attention and resources. *Saucier v. Katz,* 533 U.S. at 201 (two-step qualified immunity analysis "serves to advance understanding of the law and to allow officers to avoid the burden of trial if qualified immunity is applicable."); *Hunter v. Bryant,* 502 U.S. 224, 228 (1991). ("Immunity ordinarily should be decided by the court long before trial.")

Respondent repeats the majority opinion's characterization of Haugen as an unarmed man "shot in the back as he attempted to drive away [from the officer]" (*see* App. 13; *Opposition Brief*, 24). The description reveals the utter

refusal to consider events from the officer's perspective, namely her stated concern for *others in front of Haugen's vehicle and in his path*. This misleading description of events simply underscores the fundamental error below. It is true that other panels have upheld qualified immunity decisions in the Ninth Circuit, as perhaps the six judges dissenting from hearing *en banc* in this case would have, given their observation that the "majority goes to great lengths to explain – with the benefit of hindsight – the small ways in which Officer Brosseau's perceptions were inaccurate" rather than looking at facts "as Brosseau reasonably perceived them." App. 2. This decision is wrong, and it clearly has significant implications for any officer considering the use of deadly force to protect against the consequences of a suspect's reckless vehicular escape.

CONCLUSION

The majority opinion in this case conflicts with fundamental principles this Court has set out for addressing the appropriate balance of individual liberties and public safety in § 1983 use of force cases. For the stated reasons, petitioner Brosseau urges this Court to accept review of this case.

Respectfully submitted this 27th day of July, 2004.

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